

**HOUSE NATURAL RESOURCES COMMITTEE**

**HOUSE BILL 831 - REVISE WATER USE LAWS**

Chairman McNutt and members of the committee: For the record my name is Jay Skoog, Executive Director of the American Council of Engineering Companies of Montana. Our association represents engineering firms across Montana who employ professional engineers and hydrogeologists who are considered to be experts in the field.

Our members thank the committee for its dedication to this complex issue this session; however we are unable to support HB831 as presently written. We would like to share our concerns with this bill and continue to hope that the legislature can address the issue this session.

Our first concern is that Section 16(2)(b)(i) of the bill requires documentation of potential hazards to water quality and what is planned to mitigate the potential problems. This duplicates the requirements that already exist under DEQ regulations. It is not a good idea to give the same review authority to two different agencies. DEQ enforces the water quality regulations for source water protection and non-degradation of groundwater. Why should DNRC offer further review of these same issues? It is DEQ that determines whether all of the regulations regarding water quality have been satisfied. DNRC should not have authority to conduct a separate review. This requirement will generate considerable additional costs, possibly additional hearings, and certainly additional delays in obtaining permits for groundwater development, all for duplication of effort.

Our second concern is that Section 16(4)(b) provides for the Montana Bureau of Mines and Geology (MBMG) to review hydrogeologic assessments and data for "scientific adequacy". Currently, methods of investigations and their accomplishment must conform to standards set forth in regulations enforced by the DNRC and the DNRC policies about how to enforce the regulations. These standards in some respects are already so constraining as to substitute preemptive science and preemptive engineering for the judgment of the consultants conducting the work; however, the DNRC regulations and policies do provide the benefit of a relatively uniform approach to the investigations, analysis, and reporting.

The DNRC mandated methods are either scientific or they are not. If they are not, we need to change the regulations. If they are scientific, we do not need yet a third party (MBMG) involved in this process, rendering report-by-report judgments as to "scientific adequacy". This simply opens the door to a free-for-all regarding the work of qualified professional engineers and hydrogeologists. What standard will the MBMG use to determine "scientific adequacy"? If engineers and hydrogeologists conform to every regulation and policy enforced under the current statutes by the DNRC, how can the MBMG step in and determine that more is needed? We feel strongly that the water rights process should remain under the regulatory umbrella of the DNRC.

Our third concern relates to the changes to the closed basin exemptions to "use by a municipality" (Sections 5, 9 and 11). We feel that removal of the domestic use exemption will have negative consequences for Montana's growing economy and population.

Our final comment, and perhaps the most important, is that this legislation potentially changes the basis for enforcement of the doctrine of prior appropriation in the State of Montana. Historically, Montana water law has been enforced to protect the rights of senior water users. We agree that this should continue to be the goal of our water law. Applicants for a new appropriation have always been under the burden of proof to show that their proposed new appropriation will not adversely affect the rights of senior appropriators of surface water and groundwater. The applicants had to meet the test of no adverse effect, otherwise their application would be denied unless they could demonstrate some type of augmentation that would ensure the senior appropriators would not be affected.

The legislation does not follow this historical precedent. Instead of "adverse effect" being the test of how a senior appropriator might be affected, HB831 uses "increase in net depletion" as the measure of an effect. Accordingly, this proposed legislation potentially closes the door to any increase in the use of water in Montana. If you have a need for a new use of water, you have to cease some old use of water and convert it to the new use. This approach is certainly appropriate in some basins, but in other basins (including some closed groundwater basins), it does not make any sense because it is demonstrable that a new use and associated increase in net depletion from the basin will not cause an adverse effect on existing surface water users.

Section 15(3)a attempts to address the latter issue and move the standard back to adverse effect, not net depletion, stating: "If the hydrogeologic assessment predicts that the proposed appropriation right or change in appropriation right will result in a net depletion of surface water, the applicant shall determine if the net depletion results in an adverse effect on a prior appropriator. If there is no adverse effect on a prior appropriator and the department agrees with this determination, the department shall proceed . . ."

The latter language is good, as far as it goes, but it stops short of enforcing these proposed regulations on the basis of net depletion rather than adverse effect because the proposed legislation does not include any definition of "adverse effect" or how to address cumulative effect. Until acceptable procedures or definitions, based on sound hydrogeologic and engineering practices, are established in the regulations for how to determine an adverse effect and how to determine cumulative effect, the DNRC will continue to be subject to political pressures and unscientific Court decisions to revert to no new net depletions as the measure of adverse effect, whether or not they are sensible. Likewise, the layman DNRC Hearings Examiners and the layman Courts will continue to be rudderless with regards to how the issue of adverse effect should be determined. In my opinion, this issue must be resolved by the DNRC and other hydrogeologic experts in the State of Montana before adequate legislation can be passed.

We recognize that the current status quo, i.e., DNRC not accepting any new applications in closed basins, must be corrected. If the above issues could be properly addressed in this proposed legislation, it could be a sensible way to move forward.